



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CIVIL SUIT NO. 43 OF 2010 (OS)**

**J K W.....APPLICANT**

**VERSUS**

**E W K.....RESPONDENT**

**RULING**

The Respondent was dissatisfied with the decision of this court delivered on 22<sup>nd</sup> April 2014 directing the appointment of an estate agent to manage the two properties that are the subject of dispute, and secondly, directing that the income received from the two properties be shared equally between the Applicant and the Respondent pending the hearing and determination of the suit. The Respondent filed notice of her intention to appeal against the decision to the Court of Appeal. The Respondent has also filed an application pursuant to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** seeking to stay the execution of the said order pending the hearing and determination of the intended appeal. The application is supported by the annexed affidavit of the Respondent. In essence, the Respondent states that she has an arguable appeal and should be given an opportunity by this court to ventilate the same before the Court of Appeal. She further states that unless the order prayed for is granted, the Applicant may proceed to execute the same thus rendering the intended appeal nugatory.

The application is opposed. The Applicant filed grounds in opposition to the application. The Applicant insists that the Respondent has no arguable appeal and that the application is meant to deny the Applicant an opportunity to enjoy the proceeds from the rent paid in respect of the two properties. He urged the court to disallow the application.

During the hearing of the application, this court heard oral rival submission made by Mr. King'ara for the Respondent and Mr. Kalii for the Applicant. This court has carefully considered the said arguments. The issue for determination by this court is whether the Respondent made a case for this court to stay the execution of the order that the Respondent wishes to appeal against in the Court of Appeal. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** requires any applicant who wishes to have an order or decree stayed pending the hearing of the intended appeal to establish that he would suffer substantial loss if stay is not granted. Such applicant must also be prepared to provide the security for the due performance of the decree. Finally, the application for stay must be filed without undue delay. In **Butt –vs- Rent Restriction Tribunal [1982] KLR 417** at page 419, Madan JA (as he then was) held thus:

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No.2) 12 Ch D (1879) 454 at p.459. In the same case, Cotton LJ said at p.458:*

*“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.””*

The Respondent's counsel relied on a decision of this court (Porter J) made in **New Stanley Hotel Limited –vs- Arcade Tobacconists Limited [1986] KLR 757** where it was held that the court, before making an order staying the execution of a judgment, must be satisfied that substantial loss may result to

the Applicant unless the order was stayed and the application was made without undue delay. The court further held that, where there was little likelihood that the Applicant will pay the sum decreed, to require him to deposit the sum as security would deprive such applicant his right of appeal.

It is not within the mandate or jurisdiction of this court to determine whether or not the intended appeal to be lodged by the Respondent has merit or not. However, in determining the present application, this court, in the interest of justice, will of necessity have to weigh the interest of the Respondent *vis-a-vis* that of the Applicant. As stated in the Ruling, the Applicant is the registered owner of the suit properties. He is ailing. He does not have any other source of income. He is currently being supported by a member of his family. The Respondent wants to appeal against the decision of this court. That is her constitutional right. However, she has to establish that she would suffer substantial loss if stay of that order is not granted. This court asked itself this question: ***What substantial loss would the Respondent suffer if she pays part of the monthly rental income to her husband (the Applicant) to support himself and pay for his medical bills?*** This is contrasted with the desire by the Respondent to deny the Applicant the right to an income from his investment at the twilight of his life.

Weighing the two positions, it is clear to this court the Respondent will not suffer any substantial loss if stay is refused. The Respondent can ventilate her appeal before the Court of Appeal, meanwhile the Applicant will at least get something from the rental income received from the two properties to support himself and pay his pressing medical bills. The application therefore lacks merit and is hereby dismissed with costs.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2014.**

**L. KIMARU**

**JUDGE**